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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

JOHN AND PATRICIA TRAPANESE,
Respondent

v.

HONORABLE LOUIS H. POLLAK,
Respondent

APPENDIX TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and PATRICIA HANDO TRAPANESE, h/w	:	
v.	:	Civil Action Number:
GIDDINGS and LEWIS MACHINE TOOL COMPANY	:	81-1161

ORDER

AND NOW, to wit, this day of , 1983, it is hereby ORDERED and DECREED that the verdict herein and the judgment entered thereon on the 27th day of December, 1982, be hereby set aside and vacated, and that Judgment be entered notwithstanding the verdict, or, in the alternative, a new trial be granted in the above captioned matter.

By the Court:

/s/ _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and PATRICIA HANDO TRAPANESE, h/w	:	
v.	:	Civil Action Number:
GIDDINGS and LEWIS MACHINE TOOL COMPANY	:	81-1161

PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL

Plaintiffs, John and Patricia Trapanese, by their attorneys, ANAPOL, SCHWARTZ, WEISS & SCHWARTZ, hereby move this Court for an Order setting aside the verdict entered in favor of Defendant, Giddings and Lewis Machine Tool Company, and the entry of a Judgment in favor of the Plaintiffs Notwithstanding the Verdict, or, in the alternative, move this Court for an Order granting a new trial in the above-captioned matter, and in support thereof, aver as follows:

I. The verdict was against the weight of the evidence.

II. Based on the evidence presented, the only proper jury verdict would have had to have been for the Plaintiffs.

III. The Court committed prejudicial error by not permitting the jury to consider whether the "rail down" button (or any buttons other than the "run" or "jog" buttons) on the subject pendant control station were defective and were the cause of John Trapanese' accident, despite the fact that:

(a) Such evidence was consistent with the pleadings and discovery in this case;

(b) Such evidence was consistent with the expert reports submitted in advance of trial;

(c) The evidence at trial was that all buttons were to be guarded except stop buttons and particularly run and jog.

(d) The theory that the rail button may have been activated by an accidental or intentional depression was presented for the first time by Defendant's expert at the time of trial, and Plaintiffs' counsel was refused any opportunity to cross-examine on this issue.

(e) The presentation of this theory by the defense was a complete surprise, as it had not previously been set forth in any pleading, discovery, pre-trial memorandum or other format; and,

(f) Despite all of the foregoing, the Court erred in failing to permit Plaintiffs to cross-examine on this subject, or to otherwise offer rebuttal evidence on this subject.

IV. The Court compounded the aforesaid errors by improperly responding to the jury's questions during their deliberations, and permitting the jury to consider only the defective nature of the run and jog buttons.

V. The Court erred and compounded the prejudicial effect of the errors described in III and IV above, by failing to issue any ruling with regard to Plaintiffs' Motion to Compel Discovery, which was filed in advance of trial seeking the facts and opinions which were ultimately proferred at trial.

VI. The Court erred in permitting Counsel for Defendant to prejudice the Plaintiffs and the Plaintiffs' chief expert, Lester Moskowitz, and thereby tainting his testimony, by making unwarranted attacks and unfounded allegations that he was personally involved in a consumer fraud, that he was involved in a fraud with the State of New Jersey, and of the withdrawal of a sworn Affidavit suggestive of the fact that it was false.

VII. The Court erred by not precluding Defendant's experts from testifying as to accident reconstruction or test results because:

(a) Defendant improperly failed to provide Plaintiffs with copies of thirty-seven (37) photographs of the machine in question, which were in Defendants possession long before trial and which were the subject of specific discovery requests.

(b) Defendant similarly failed to provide Plaintiffs with the documents reflecting the specifications for the re-assembly of the subject machine which Defendant's expert reviewed.

(c) Defendants failed to establish a foundation for their argument that test results or conclusions reached by observation of an alleged "sister machine" had any relevance in this case.

VIII. The Court erred in its charge to the jury:

(a) By failing to charge as requested by Plaintiffs;

(b) By failing and denying Plaintiffs' request to charge that contributory negligence was not a defense in this case;

(c) By failing to charge that assumption of the risk was not a defense in this case;

(d) By failing to charge Plaintiffs' additional Supplemental Point For Charge;

(e) By failing to adequately charge the jury on circumstantial proof;

(f) By improperly charging the jury on the issue of proximate cause;

(g) By failing to properly define "substantial factor".

IX. The Court committed prejudicial error by offering the jury answers to the questions posed by the jury which were contrary to the law and evidence, and which

in effect directed the jury to enter a verdict for the Defendant; in particular:

(a) The Court permitted the jury to consider only whether the run or jog buttons were defective, when the only other theory presented for the cause of this accident (although this also was not substantiated by any credible evidence) was similarly premised on the existence of a defective unguarded button on the subject pendant station, and, the jury was not permitted to even consider said defect;

(b) The Court committed prejudical error by allowing the jury to consider whether John Trapanese' own conduct was a substantial or contributing cause to the happening of the subject accident.

X. The Court committed prejudicial error during a correction charge on Insurance by telling the jury that they as consumers, ultimately pay through premiums for all insurance claims.

XI. The Court committed prejudicial error by permitting Defendant's experts, Mr. Fink and Dr. Sander, to testify as to facts and opinions beyond those disclosed in Defendant's Answers to Interrogatories, Expert Reports and the parties oral agreement confirmed in writing.

XII. The Court erred by permitting Mr. Fink to testify as to the cause of the accident.

XIII. The Court committed error by refusing Plaintiffs' request for a new jury panel when defense counsel suggested to the jury that Giddings and Lewis was self-insured or, in effect, had no insurance.

XIV. The Court erred in not permitting the Plaintiff's to show:

(a) That the "sister machine" observed after the occurrence had guards, for both impeachment of

defendants' expert and evidence probative of the cause of the accident.

(b) That the Defendant in 1958 guarded all buttons on pendant stations, particularly in view of Defendants continued attempts to offer evidence of non-feasibility or non-defect.

XV. The Court erred by prohibiting Plaintiffs' expert, Mr. McWilliams from offering rebuttal testimony that the machine was further defective by virtue of the evidence offered for the first time by Defendants' experts at trial.

XVI. The Judge committed error by not permitting counsel for Plaintiffs to argue in his closing speech that the defense in this case was one of confusion.

XVII. Plaintiffs allege such further prejudical error as is revealed upon a review of the complete trial transcript.

Respectfully submitted,
ANAPOL, SCHWARTZ, WEISS AND SCHWARTZ

By: _____
ALAN SCHWARTZ, Esquire
LAWRENCE R. COHAN, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and PATRICIA HANDO TRAPANESE, h/w	:	
vs.	:	CIVIL ACTION
GIDDINGS and LEWIS MACHINE TOOL COMPANY	:	NUMBER: 81-1161

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Rule 59 of the Federal Rules of Civil Procedure provides for a Motion for New Trial or Judgment Notwithstanding the Verdict (JNOV), to be served not later than ten (10) days after the entry of judgment. Judgment was entered on or about December 27, 1982, and, therefore, the enclosed Notice and Motion is timely.

Plaintiffs contend that there are numerous valid grounds for the entry of Judgment Notwithstanding the Verdict (JNOV) or for granting a new trial and hereby incorporates by reference the grounds asserted in Plaintiffs' Motion. In order for Plaintiffs to more specifically set forth their allegations in support of the instant Motion, it is necessary to obtain the Notes of Testimony from the trial.

It is respectfully requested that Plaintiffs be given the opportunity to file a brief in support of Plaintiffs' Motion For A New Trial in accordance with the briefing

schedule established by this Court once the Notes of Testimony are obtained.

Respectfully submitted,

By: _____

ALAN SCHWARTZ, Esquire
LAWRENCE R. COHAN, Esquire
Attorneys for Plaintiffs

1900 Delancey Place
Philadelphia, Pa. 19103
(215)735-03330

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN and PATRICIA HANDO TRAPANESE, h/w	:	
v.	:	Civil Action Number:
GIDDINGS and LEWIS MACHINE TOOL COMPANY	:	81-1161

CERTIFICATION

I, ALAN SCHWARTZ, ESQUIRE, do hereby certify that a true and correct copy of the within Motion, Memorandum of Law and proposed Order was personally served upon Barton Post, Esquire, counsel for Defendant, Giddings and Lewis Machine Tool Company, at his office address, 210 West Washington Square, 12th Floor, Philadelphia, Pennsylvania, on Wednesday, January 5, 1983.

ANAPOL, SCHWARTZ, WEISS & SCHWARTZ

By: _____
ALAN SCHWARTZ, Esquire
LAWRENCE R. COHAN, Esquire

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN TRAPANESE and PATRICIA HANDO TRAPANESE, H/W	:	Civil Action Number: 81-1161
v.	:	
GIDDINGS AND LEWIS MACHINE TOOL COMPANY	:	

PLAINTIFFS' SUPPLEMENTAL POINTS FOR CHARGE

1. You are instructed that contributory negligence is not a defense in this case. Giddings and Lewis may not escape liability even if you believe that John Trapanese was himself negligent, as long as you find that the Giddings and Lewis Vertical Boring Mill involved in this case was defective (as I have defined that term for you) at the time when it was manufactured and sold by Giddings and Lewis.

You are therefore not to consider whether nor not John Trapanese exercised due care or acted reasonably under the circumstances. Your determination of whether or not Giddings and Lewis is strictly liable under §402A of the Restatement of Torts, 2nd, must be made without considering such issues.

Similarly, you are not to consider balancing negligence or the question of comparative fault in your deliberations.

2. You are not to consider the questions of whether or not the Vertical Boring Mill in questions was properly used, properly maintained or whether or not it was at any time substantially changed, as such issues are not relevant in the context of this case. I instruct you that under the evidence presented as a matter of law you may not find that the machine in question was improperly

maintained, improperly used, or substantially changed. I have withdrawn all of these issues from your consideration.

3. Assumption of risk is not a defense in this case. I direct you to conclude as a matter of law that Mr. Trapanese did not assume any of the risks associated with the happening of this accident.

4. The Defendant, Giddings and Lewis, has stipulated with the Plaintiffs in this case that guarded operating buttons were available, practical and feasible, had Giddings and Lewis wanted to use them in their product for use in 1953 and as early as 1938. The genuiness of evidence concerning the availability of guarded Square "D" Company buttons in 1938 has also been the subject of this stipulation, Square "D" Company being the source of Giddings and Lewis buttons involved in this case.

5. When you are weighing the evidence presented to you, I instruct you that any expert opinion offered which you believe contradicts the facts which you believe to be true must be rejected. What the facts of this case are is for your determination alone, and you may reject any expert opinion which you believe is not supported by the facts.

6. I advise you that questions asked by counsel and comments made by counsel are not evidence in this case. You should not weigh such questions or remarks in your deliberations.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Chambers of
Louis H. Pollak
United States District Judge

13613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106
215 597-9590

June 3, 1983

Barton L. Post, Esq.
Christopher H. Wright, Esq.
Post & Schell
12th Floor, 210 West Washington Square
Philadelphia, Pa. 19106

Re: *Trapanese v. Giddings & Lewis Machine Tool Co.*
Civil Action No. 81-1161.

Dear Messrs. Post and Wright:

After receiving notice of the Court of Appeals' denial of defendant's application for mandamus, I convened a telephone conference in early April with a view to moving this case back on track for retrial at an early date. During that conference, Mr. Wright, representing defendant, advised me and opposing counsel that defendant would very soon be filing a petition for certiorari. On the basis of that advice, I left undisturbed the stay on further discovery imposed when defendant filed its application for mandamus.

I am now informed by my law clerk, David Green, who very recently telephoned Mr. Wright, that Mr. Wright has advised him that a certiorari petition has not yet been filed.

I find this more than surprising: I had supposed that a certiorari petition was filed nearly two months ago. And, of course, the continuing stay of further proceedings in this delayed case was predicated on that supposition.

I expect to be informed at once whether, and if so when, a certiorari petition is to be filed. If defendant has abandoned its plan to petition for certiorari, an order will enter directing that discovery be resumed forthwith and concluded as quickly as possible.

Very truly yours,

cc: Alan Schwartz, Esq.
Office of the Clerk.

APPENDIX D

SUMMARY OF SIX ELEMENTS

We have now discussed all six of the elements or factual claims which plaintiff must prove in order to show that Giddings & Lewis is liable. Allow me to repeat them for you in summary fashion to insure that you have them all firmly in mind. The plaintiff must prove by a preponderance of the evidence:

(1) That Giddings & Lewis manufactured and sold the 64" verticle boring mill which allegedly caused Mr. Trapanese's injury;

(2) That Giddings & Lewis is in the business of selling such equipment;

(3) That the verticle boring mill at the time of the accident was without substantial change from the condition it was in at the time it left Giddings & Lewis's hands;

(4) That the boring mill contained a defect, that being the lack of guarded run and jog buttons on the pendent control station;

(5) That the defect existed at the time the boring mill was sold; and finally

(6) That the alleged defect was a proximate cause of Mr. Trapanese's injury.